United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1231

To be argued by
ELIA WEINBACH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1231

UNITED STATES OF AMERICA,

Appellee,

—against—

LASZLO JERMENDY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Laszlo Jermendy appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*) entered May 14, 1976, convicting him, after a jury trial, of theft of Government property having a value in excess of One Hundred Dollars ($100.00), in violation of Title 18, United States Code, Section 641 and 2. Appellant was charged and convicted of stealing and converting to his own use on June 10, 1975, a .357 magnum Smith & Wesson service revolver, serial number 1K19496, which, on that date, was in the possession of Roland O. Lindsay, Special Agent of the United States Secret Service. Judge Bramwell sentenced appellant to ten years imprisonment. Appellant is currently serving this sentence.

Appellant, who does not challenge the sufficiency of the evidence, contends that the District Court's instruc-

tion to the jurors, that knowledge of the Government's ownership of the property was not an element of the crime charged, was plain error.

Statement of Facts

A. The Government's Case

The Government linked appellant in a number of independent ways to the theft of Lindsay's gun. The proof was overwhelming. First, Agent Lindsay identified Jermendy as one of the robbers in court, as well as in a photographic spread. Second, Jermendy's fingerprints were found on a card in Lindsay's wallet that was dusted for latent fingerprints immediately after the theft. Third, the gun which was stolen from Lindsay, as well as most of the other stolen items, were recovered in Jermendy's apartment where he was arrested about ten weeks after the theft. Fourth, at the time of the arrest, Jermendy was wearing a hat similar, if not identical to, the hat he had worn during the robbery. Fifth, at the time of the arrest, Jermendy was also wearing a wrist watch which had been taken from Christopher Ryan, Lindsay's roommate, who was also robbed on June 10th. Sixth, and certainly not least, immediately after his arrest, Jermendy confessed that he had robbed Agent Lindsay on June 10th and had stolen Lindsay's service revolver.

1. The Theft

Early in the morning hours on June 10, 1975, Roland Lindsay, a Special Agent in the United States Secret Service, was asleep in his apartment in Queens, New York. He was alone. At approximately 2:30 a.m., he

was awakened by an intruder, brandishing a .38 caliber revolver, who ordered him out of bed and into the living room. Lindsay identified appellant Laszlo Jermendy as the intruder. (25).[1] While Jermendy looked over his shoulder to the living room, Lindsay leaned to the side of his bed in an attempt to reach his .357 magnum service revolver. (26).[2] Jermendy saw Lindsay trying to get his gun and he jumped on the bed, placed his loaded gun[3] across the bridge of Lindsay's nose, and threatened to blow Lindsay's head off if he moved. (28).

Lindsay was ordered to go into the living room, which was lighted, where he saw his roommate, Christopher Ryan, seated on a couch. Another man, Kenneth Helmstadt,[4] stood over Ryan, holding a knife to Ryan's throat. Both Ryan and Lindsay were then ordered to lie face down on the living room floor where they were tied with handcuffs, telephone and lamp wire. (32, 33). During the next fifteen minutes, while Lindsay and Ryan lay prostrate on the floor, watched by Helmstadt, Jermendy proceeded to ransack the apartment. The minutes were terrifying and Lindsay testified that he was afraid

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[1] Page numbers in parenthesis refer to the trial transcript.

[2] The gun, a Smith and Wesson service revolver, serial 1K19496, was assigned to Lindsay by the Secret Service. It is this gun that was the subject of the indictment in this case. (47, 50).

[3] Lindsay was able to see the ammunition in the cylinders of Jermendy's gun. (29).

[4] Kenneth Helmstadt was arrested after appellant's trial, pleaded guilty to the indictment and was sentenced by Judge Bramwell on July 23, 1976, to seven years imprisonment under Title 18, U.S.C. § 5010(c). Helmstadt had been identified by Jermendy as "Lefty" in his post-arrest statement. See pp. 5-6, *infra*. Helmstadt was indicted with Jermendy as John Doe, also known as, "Lefty" in Indictment 75 Cr. 785. For clarity's sake, Helmstadt will be referred to by his true name although at trial he was referred to as suspect number two or "Lefty."

for his life (117), particularly after Jermendy shouted out to Helmstadt: "Look what he had beside the bed. He could have killed me. He was going to kill me. This guy is a cop." (35). Jermendy showed Helmstadt Lindsay's gun, and at one point, Jermendy kneeled behind Lindsay's back, telling Helmstadt to put Lindsay's revolver to Lindsay's head and to kill him if he moved. (37). Helmstadt, obediently cocked the revolver which was against Lindsay's right temple (37). Lindsay pleaded with Jermendy, reminding him of the difference between armed robbery and murder. (35).

Jermendy continued to ransack the apartment and, after about fifteen minutes, he and Helmstadt left the apartment, carrying a garment bag loaded with various items belonging to Ryan and Lindsay (53). Lindsay and Ryan freed themselves, notified the police, and noted the items stolen by Jermendy and Helmstadt. The .357 magnum service revolver next to Lindsay's bed was missing, as were a .38 caliber revolver and holster, a Winchester lever action hunting rifle and scabbard, another rifle, two pocket calculators, a tape recorder, two Seiko watches, rounds of ammunition, several flight bags and approximately Three Hundred Dollars ($300.00).

Lindsay gave police officers who arrived at his apartment a list of the stolen items and described Jermendy whom he had ample opportunity to see. (25, 30, 75, 105, 116). Latent fingerprints were taken by police officers from cards in Lindsay's wallet, found on his bed after the robbery. (41, 208). On the same day as the robbery, Lindsay viewed photographs at a police station, and picked out four suspects who most resembled Jermendy. (84).[5] A composite sketch was

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[5] Lindsay stated, however, that none of the photographs were of either robber. (106).

later drawn by a police artist based on Lindsay's description of Jermendy (79, 107).

2. The Arrest of Jermendy

On August 27, 1975, New York City Police Detective Dennis Muldoon obtained a search warrant to search premises located at 336 Bleecker Street, Brooklyn, New York, where various items stolen from Lindsay's apartment on June 10th were seen. (127-129). Muldoon and other police officers and Secret Service agents searched the apartment and discovered most of the items stolen from Lindsay and Ryan, including the Winchester rifle, the rifle scabbard, a clothing bag, a revolver holster, a small airline bag, and rounds of ammunition. In addition, the police officers found Lindsay's .357 magnum service revolver hidden in a mattress in the apartment (132-136).

Appellant, who was in the apartment before and during the search, was arrested by Detective Muldoon. At the time of his arrest, appellant was wearing a similar, if not identical hat, to the one he wore on June 10, 1975, when he stole Lindsay's gun. (108, 151). He was also wearing one of the Seiko wrist watches which had been stolen on June 10, 1975 from Christopher Ryan, Agent Lindsay's roommate (55-56, 172).

Appellant was then taken to Secret Service headquarters, advised of his constitutional rights, and interviewed after he had waived his rights. At first, he denied knowing anything about the robbery and claimed that the police department had "framed" him by planting the guns in his apartment at 336 Bleeker Street. (178). Thereafter, however, Jermendy admitted robbing Lindsay and Ryan and provided a lengthy and

detailed account of the theft and the subsequent concealment of the stolen items. (182-186). Jermendy admitted taking the guns from Lindsay's apartment and conceded that the watch he was wearing when arrested belonged to Ryan. (186).[6]

3. Post Arrest Identification of Jermendy

The Government established that, after his arrest, appellant Jermendy was identified as one of the robbers in two different ways. First, Mr. James Bartee, a Secret Service fingerprint expert, testified that the latent fingerprints taken after the theft from the wallet cards in Lindsay's apartment were appellant's. (187, 208, 222). Second, Lindsay testified that after being informed that Jermendy had been arrested, he viewed a photospread shown to him by another agent, and immediately selected a photograph of Jermendy as one of the men who had robbed him in June. (89-90, 190).

B. The Defense Case

Appellant testified in his own behalf, and his defense consisted primarily of denials of the facts adduced in the Government's case. For example, he denied having been in the vicinity of Lindsay's apartment on June 10, 1975 (307), he denied that he was permanently living at 336

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[6] According to Jermendy, Ryan was robbed in the garage of the apartment building and then directed to his apartment by Jermendy and Helmstadt. (184). Ryan, at the time of trial, was living in Dublin, Ireland and did not testify. (301).

[7] A pre-trial hearing was held, *Simmons* v. *United States*, 390 U.S. 377 (1968), and Judge Bramwell held that Lindsay could make an in-court identification.

Bleecker Street (307, 309), he denied knowing that the stolen gun and other items were in the apartment at 336 Bleecker Street where he claimed he was painting a friend's apartment (309, 316, 328), and he denied making any statement to agents after his arrest, other than to deny his involvement. (340).

ARGUMENT

The District Court's Instruction to the Jurors That Knowledge of the Government's Ownership of the Property Stolen Was Not An Element of the Crime Charged, Title 18, United States Code, § 641, Was Entirely Correct.

Appellant contends that knowledge that the property stolen (the Smith & Wesson service revolver) belonged to the Government was a substantive element necessary for a conviction of theft of Government property in violation of 18 U.S.C. § 641.[5] Thus, so the argument runs, his conviction must be reversed since, although there was no objection, it was plain error to fail to instruct upon that element. We contend that this claim is without merit.

First, five of the six Circuits that have considered this issue have concluded that knowledge of the Government ownership of the property taken is irrelevant to a Section 641 prosecution. *United States* v. *Crutchley*,

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[5] Title 18, U.S.C., § 641, provides in part:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or for any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof."

502 F.2d 1195, 1201 (3d Cir. 1974); *United States* v. *Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971); *United States* v. *Smith*, 489 F.2d 1330, 1332-1334 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974); *United States* v. *Roundtree*, 527 F.2d 16, 18-19 (8th Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Howey*, 427 F.2d 1017 (9th Cir. 1970); *Contra*, *Findley* v. *United States*, 362 F.2d 921 (10th Cir. 1966). Moreover, each of the Circuits that have held knowledge of Government ownership irrelevant to a Section 641 prosecution, have expressly rejected the Tenth Circuit decision of *Findley* v. *United States*, *supra*, upon which appellant relies.

Perhaps the best explanation of the incorrectness of the *Findley* holding, which illustrates appellant's misplaced reliance on *Morissettte* v. *United States*, 342 U.S. 246 (1952) and the history of Section 641, is set forth in the opening of Judge Hufstedler, writing for the Ninth Circuit in *United States* v. *Howey*, *supra*.

> . . . We think that *Findley* is wrong, and we decline to follow it.
>
> *Findley* does not explain how the conclusion was reached that such knowledge is essential, other than to cite Morissette v. United States (1952) 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 and Souza v. United States (9th Cir. 1962) 304 F.2d 274, neither of which is authority for the point. *Morissette* held that Congress intended that felonious intent would be an essential element of the larceny-type offenses stated in section 641, despite its failure to say so. Nothing in *Morissette* suggests that knowledge of the identity of the owner of the property taken is an ingredient of felonious intent. The defendant in *Souza* claimed that he had been prejudiced by the fail-

ure of the indictment to charge felonious intent expressly; the indictment had been framed in the language of section 641. In the course of rejecting that contention, our court quoted from the jury instructions that had included a charge requiring that Souza knew that the stolen property belonged to the Government. We neither approved nor disapproved the instruction. The propriety of the knowledge part of the instruction was not discussed.

* * * * *

Section 641 was a consolidation of four former larceny-type offenses, scattered through Title 18, before its 1948 revision. The history of section 641 and its antecedents demonstrates that Congress intended the section to codify the common law crimes of larceny and embezzlement, together with those other acts which shade into those common law offenses, yet fail to fit precisely within their definitions. It was not an essential part of the common law larceny-type offense that the thief knew who owned the property he took; it was enough that he knew it did not belong to him. The legislative history provides no support for an assumption that Congress intended in section 641 to add to the common law offenses a new requirement that a thief know who owned the property he was stealing.

The reason for including the requirement that the property, in fact, belongs to the Government was to state the foundation for federal jurisdiction. A defendant's knowledge of the jurisdictional fact is irrelevant, as we have held in many cases interpreting analogous statutory provisions. (*E.g.*, United States v. Kartman (9th Cir. 1969) 417 F.2d 894; McEwen v. United States (9th Cir.

1968) 390 F.2d 47. *See also* United States v. Bolin (9th Cir. 1970) 423 F.2d 834. (*Id.* at pp. 1017-1018, footnotes omitted).

This, analysis, we submit, is the complete answer to appellants contention on this appeal.

Moreover, by way of analogy, if further discussion of this issue is necessary, the Supreme Court in *United States* v. *Feloa*, 420 U.S. 671 (1971) held that knowledge that the intended victim is a federal officer is not a necessary element for the crime of conspiracy to assault a federal officer while engaged in the performance of his official duties. Of course, for the subtantive charge of assault on a federal officer, this Court has consistently held that it is not necessary for the Government to show that the assailant knew that his victim was a federal officer. E.g., *United States* v. *Ulan*, 421 F.2d 787, 788 (1970); *United States* v. *Lombardozzi*, 335 F.2d 414, 416 (2d Cir.), *cert. denied*, 379 U.S. 914 (1964). Other helpful analogies, where it has been held that the Government need not show that the defendant had knowledge of a necessary jurisdictional fact, are prosecutions under 18 U.S.C. § 659, *United States* v. *Tyers*, 487 F.2d 828, 830 (2d Cir. 1973) (knowledge that property stolen from interstate commerce not necessary); and, prosecutions under 18 U.S.C. 2113(a), *United States* v. *Schaar*, 437 F.2d 886 (7th Cir. 1971) (not necessary to prove knowledge that building entered was a bank); *Cf. United States* v. *Licausi*, 413 F.2d 1118, 1121 (5th Cir. 1969).

As the above-discussion indicates, the fact of government ownership is jurisdictional only and the jury need not be instructed that the defendant knew this fact. Accordingly, it is submitted that the conviction should be affirmed.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: October 12, 1976

Respectfully submitted,

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